## BANK ISLAM MALAYSIA BHD. v. TINTA PRESS SDN. BHD. & ORS.

[O.C.J. (Zakaria Yatim J.) August 20, 1985]

[Kuala Lumpur – Civil Suit No. C 2518 of 1984]

*Practice and Procedure – Interlocutory mandatory injunction – Ex parte application – Application to dissolve and set aside injunction – Power of court to grant interlocutory mandatory injunction – Urgent and exceptional case – Balance of convenience.*

*Lease – Lease of equipment – Breach of agreement – Owner entitled to recover equipment.*

In this case the plaintiffs had leased certain printing equipment to the first defendant. The first defendant having defaulted in payment of the lease rent, the plaintiffs brought an action to recover possession of the equipment and to recover the arrears of rent. The plaintiffs also made an ex parte application for a mandatory injunction to enable the plaintiffs to recover possession of the equipment. The first defendant applied to dissolve and set aside the mandatory injunction.

**Held**: (1) the court has jurisdiction to grant a mandatory injunction on an *ex parte* application in urgent and exceptional cases;

(2) it is clear that the relationship between the plaintiff bank and the first defendant in this case was that of lessor and lessee. There had been a clear breach of the agreement by the first defendant and the plaintiff bank as the owner of the equipment was entitled to recover possession of the equipment;

(3) the plaintiff-bank had an unusually strong and clear case again the first defendant and if the injunction had not been granted earlier, the plaintiff bank would suffer grave damage and greater hardship. The balance of convenience was very much in favour of the plaintiff;

(4) this was clearly an exceptional case where the court was justified in granting a mandatory injunction on an *ex parte* application;

(5) considering all the circumstances of the case, including the rights of the parties, the balance of convenience and the urgency of the matter, this was a proper and appropriate case to grant the mandatory injunction.

*Cases referred to:*

(1) *Wah Loong (Jelapang) Tin Mine Sdn. Bhd.* v. *Chik Ngen Yiok* [1975] 2 M.L.J. 109.
(2) *Sivaperuman* v. *Heah Seok Yeong Realty Sdn. Bhd.* [1979] 1 M.L.J. 150.
(3) *Gibb & Co.* v. *Malaysian Building Society* [1982] 1 M.L.J. 271, 273.
(4) *Shepherd Homes Ltd.* v. *Sandham* [1971] 1 Ch. 340, 349.
(5) *Felton* v. *Callis* [1969] 1 Q.B. 200, 218-219.
(6) *Credit Corporation (Malaysia) Bhd.* v. *K.M Basheer Ahmad & Anor.* [1985] 1 M.L.J. 208, 210.

CIVIL SUIT.

*Raja Abdul Aziz Addruse* for the plaintiff.
*Dennis Xavier* for the first defendant.

**Zakaria Yatim J.** : This is an application by the first defendant to dissolve and set aside an interlocutory mandatory injunction granted by the Court on September 25, 1984. The application also seeks an order of the Court to grant an injunction to restrain the plaintiff (the Bank) from selling or disposing some printing equipment (the said property) in the possession of the Bank. In addition, the first defendant asks the Court – (1) to make an order under Order 29 rule (2) of the Rules of the High Court for the custody and/or preservation of the said property by the Bank; (2) to allow the first defendant to inspect the said property and (3) to order the Bank to return forthwith the said property to the first defendant.

The Order dated September 25, 1984 was granted by the Court on the *ex parte* application by the Bank. The order restrained the first defendant from:

(1) interfering in any way whatsoever with the taking away, recovery or resumption of possession of the printing machines by the Bank, its servants or agents.
(2) refusing to allow the Bank, its agents/servants to enter into the premises of the first defendant to effect the removal, taking away and/or resumption of the printing machines at all times until the printing machines have been completely and totally removed from the first defendant's premises;
(3) refusing to afford all reasonable access entry and exit to the Bank's agents or servants to gain entry into the first defendant's premises at No. 285, Jalan Genting Kelang, Setapak, Kuala Lumpur for the purpose of effecting the removal, taking or resumption of possession of the printing machines.

It can be seen that the above order is an interlocutory mandatory injunction order. It was not disputed by the parties that the Court has the power to order an interlocutory mandatory injunction before trial. Such an injunction, however, is granted only in exceptional cases. In *Wah Loong (Jelepang) Tin Mine Sdn. Bhd.* v. *Chik Ngen Yiok*,[1] Abdoolcader J., as he then was, in his judgment at page 111, stated the principle that "an interim or interlocutory mandatory injunction is

never granted before trial except in exceptional and extremely rare cases." This principle was upheld by the Federal Court in *Sivaperuman* v. *Heah Seok Yeong Realty Sdn. Bhd.*[2] Abdoolcader J., as he then was, in delivering the judgment of the Court said as follows:

"The first is that it is couched in prohibitory terms restraining the appellants until the trial of the suit from remaining in the quarters but it is in effect a mandatory injunction. Equity looks to the substance and intent and not to the form, and the interlocutory injunction sought and granted although prohibitory in language is mandatory in substance and effect. . .and as I said in my judgment in *Wah Loong (Jelapang) Tin Mine Sendirian Berhad* v. *Chik Ngen Yiok*, an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases."

The criteria for granting interlocutory mandatory injunction before trial have been laid down by the Federal Court in *Gibb & Co.* v. *Malaysian Building Society Bhd.*[3] In that case the Court said:

". . .The case however must be unusually sharp and clear. . . and the Court must feel a high degree of assurance that at the trial a similar injunction would probably be granted but we should observe that questions of degree are involved which depend *inter alia* upon considerations of hardship to the parties. . .The stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interests be protected by the immediate issue of an injunction . . .Other matters of particular importance are, on the one hand, the ease or difficulty with which there can be compliance with a mandatory order and the extent of hardship which compliance will cause the respondent and, on the other hand, the nature of the injury and inconvenience which will be caused to the applicant if he does not obtain protection at once. . .If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction should issue even if it gives the applicant his whole remedy before the trial."

In *Shepherd Homes Ltd.* v. *Sandham,*[4] Megarry J. said, ". . .the case has to be unusually strong and clear before a mandatory injunction will be granted. . ."

Mr. Dennis Xavier, Counsel for the first defendant, contended that the Court has no jurisdiction to grant an interlocutory mandatory injunction on an *ex parte* application by the Bank. In support of his contention he cited the case of *Felton* v. *Callis.*[5] But in that case Megarry J., in his judgment at page 219, stated, ". . .that it requires an exceptional case to justify making a mandatory order on an *ex parte* application..." Order 29 rule 1 (2) of the Rules of the High Court, 1980 states that "where the applicant is the plaintiff and the case is one of urgency such application may be made *ex parte* ..." It is clear, therefore, that the Court has jurisdiction to grant a mandatory injunction on an *ex parte* application in urgent and exceptional cases.

I shall now examine the facts of this case. The Bank is a limited company incorporated under the Companies Act, 1965 and has its head office at the Ninth Floor, Menara Tun Razak, Jalan Raja Laut, Kuala Lumpur. The first defendant is a private company limited by shares under the Companies Act, and has its principal place of business at No. 285, Jalan Genting Kelang, Setapak, Kuala Lumpur.

On December 9, 1983, the Bank, after considering the application of the first defendant for facilities of letters of credit and for the lease of a printing equipment, approved the application subject to certain conditions stipulated in the letter and in the equipment lease agreement. According to the letter the cost of the printing equipment was DM4,250,362.00 (M$3,832,000.00). The letter stated that the Bank would be the lessor and the first defendant the lessee of the equipment. The lease was for a period of seven years at a monthly rent of M$72,762,40. The first defendant was required to pay a security deposit in two instalments. The first payment was to be made on or before the signing of the lease agreement. The second payment to be made on the first of the fourth month after the Bank had fully paid the supplier of the equipment. The letter also required the board of directors of the first defendant company to pass a resolution authorising the company to obtain the said facilities from the Bank. The first defendant accepted the terms and conditions laid down in the letter of offer. Its acceptance is found at the bottom of the said letter.

Pursuant to the letter, the first defendant issued a cheque dated December 9, 1983 in the sum of $105,000.00 payable to the bank being part payment of the deposit required by the Bank. The resolution of the board of directors of the first defendant authorising the company to obtain the said facilities was passed on December 8, 1983. The Equipment Lease Agreement (the lease Agreement) was duly executed by the Bank and the first defendant on August 2, 1984 (Enclosure 2, exhibit WAR 4).

The Managing Director of the first defendant company, in his affidavit dated October 10, 1984, (enclosure 9) denied that the Bank was the owner of the equipment. He claimed that the equipment

was delivered to the first defendant and the documents relating to the equipment were in the name of the first defendant. He averred that the first defendant only acquired a loan from the Bank. I find no evidence to show that the facilities provided by the Bank constitute a loan. The Bank in its affidavit dated October 15, 1984 (enclosure 12) denied that the Bank had granted loan facilities to the first defendant. Indeed, in that affidavit, the deponent stated that the Bank, operating under Islamic Law, does not and have not granted loans to anybody or corporate body except on *qard al hasan* basis which is not applicable in the present case.

From the documentary evidence exhibited in the affidavits, I have no hesitation in concluding that the printing equipment is owned by the Bank. In the Bank's letter of offer dated December 9, 1983, the Bank agreed to provide letters of credit for the purchase of the printing equipment provided that the equipment would be leased out by the bank to the first defendant. This offer was accepted by the first defendant. The resolution of the first defendant's board of directors also recognised that the equipment was to be leased from the Bank. The resolution stated, "that the above equipment be leased from Bank Islam Malaysia Berhad... in accordance with the usual terms and conditions." Part of the deposit required by the Bank was paid by the first defendant by way of a cheque dated December 9, 1983 for a sum of $105,000.00 in favour of the Bank. The first defendant paid the balance of the deposit in the sum of $113,287.20 by a cheque dated January 6, 1984. On April 13, 1984 the first defendant paid the Bank $10,000.00 being "lease rental" for the said equipment. On July 24, 1984, the first defendant made another payment of $10,000.00 to the Bank being "Part Payment for Lease Rental." On March 23, 1984, the first defendant wrote a letter of appeal to the Bank asking the Bank to allow the first defendant to defer four months in the payment of the lease rental.

The lease agreement shows beyond doubt that the Bank is the owner of the equipment. In the agreement, the Bank is referred to as the "lessor" and the first defendant the "lessee". Clause 15(1) states that on the expiration of the lease, the first defendant has to return the equipment in good order to the Bank. Clause 16 states:

*"Equipment to Remain Lessor's Property.*

Nothing herein contained shall confer on lessee any right of property or interest in or to the equipment which shall remain the property of lessor and lessee shall have no right or interest otherwise than as bailee."

Looking at the documents as a whole, it is clear that the relationship between the Bank and the first defendant is that of lessor and lessee. The Bank, as the lessor, is the owner of the equipment. In *Credit Corporation (Malaysia) Bhd.* v. *K.M. Basheer Ahmad & Anor.*,[6] the Federal Court said:

"A lease is defined as a contract between a lessor and lessee for the hire of a specific asset selected from a manufacturer or vendor of such assets by the lessee. The lessor retains ownership of the asset. The lessee has possession and use of the asset on payment of specified rentals over a period. A lease may be specified as a financial lease or an operating lease. Judging from the terms and conditions in the light of the main characteristics, the present case is a financial lease.

At common law, it is usual to exclude the lessor from contractual liability arising from the implied terms as to fitness and quality. This is because the equipment is selected from the manufacturer or distributor by the lessee who requests the lessor to buy it and then lease it to him. The lessee takes on the responsibility of checking the condition of the equipment at the time of delivery and normally accepts it on the lessor's behalf. The lessor gives no warranty to the lessee as to the fitness of the equipment, but where there is no direct contractual arrangement between the lessee and the supplier, there is normally provision in the lease for action to be taken by the lessor on the lessee's behalf against the supplier. This is required because since the lessor is the buyer and the legal owner of the goods, he has privity of contract with the manufacturer or suppliers."

The first defendant, as the lessee, is estopped from denying that the equipment belongs to the lessor, the Bank. *Halsbury's Laws of England*, 4th Edition Vol. 16, paragraph 1629 states:

"Payment of rent is *prima facie* a recognition of the title of the person to whom it is paid, and operates as an estoppel against the tenant if he disputes that title."

The next question to consider is whether there had been a breach of the lease agreement. According to the letter written by the bank on May 5, 1984 addressed to the defendant, the first defendant had defaulted paying the lease rent to the Bank and the amount due to the Bank then was in the sum of $175,899.75. On August 10, 1985, the Bank's Solicitors wrote a notice of demand to the first defendant for the payment of a total sum of $595,341.75 being the total amount of rental due and the amount of security deposit, which the first defendant had failed to pay. In my opinion there had been a clear breach of the agreement by the first defendant. The Bank, as the owner of the equipment is entitled to recover possession of the equipment. Furthermore, Clause 14 of the Lease

Agreement, explicitly provides that if the first defendant defaults in payment of any of the sums payable under the lease, "Lessor shall be entitled to immediate possession of the equipment."

From the evidence stated above, I find that the Bank has an unusually strong and clear case against the first defendant. I am confident that at the trial of the suit, the Court will probably grant a mandatory injunction against the first defendant. If the injunction had not been granted earlier, the Bank would probably suffer grave damage and greater hardship. The value of the equipment would reduce considerably and the Bank would not be able to recover half of the money spent to purchase the equipment. I find that the balance of convenience is very much in favour of the Bank.

The other question to consider is whether the *ex parte* application made on September 25, 1983 was an urgent application. The application was supported by a certificate of urgency (enclosure 4). According to the certificate the application was "urgent on the ground that delays will cause irreparable damage to the plaintiffs." It is now necessary to state briefly the sequence of events that took place before the *ex parte* application was made. The Bank had been very helpful and extremely polite to the first defendant. When the defendant asked the Bank to allow it to defer payment of the rent for four months, the Bank told the defendant it could defer payment of the deposit in the sum of $218,287.20 instead. On May 5, 1984, the Bank reminded the first defendant that it was in arrears of rents in the sum of $175,899.75. On June 28, 1984, the Bank wrote again to the first defendant reminding it that the arrears of rent was $245,806.75. On August 10, 1984, the Bank's Solicitors wrote the notice of demand. On August 25, 1984, the Bank's Solicitors wrote to the first defendant that the Bank would take possession of the equipment under the provision of the lease agreement. In his affidavit (enclosure 2) in support of the *ex parte* application, the Manager of the Bank said that on August 27, 1984 he, together with other servants and agents of the Bank, dismantled and removed one unit of the equipment. While they were in the process of removing the second unit, about fifteen people, who were servants and agents of the first defendant closed and locked the premises thus preventing the Bank from taking the rest of its equipment. Seventeen days after the incident, the Bank filed a writ against the defendant. On the same day the writ was filed, *i.e.* on September 13, 1984, the *ex parte* application was filed. I do not think there was an unreasonable delay on the part of the Bank in filing the writ and the *ex parte* application in view of the circumstances of this case.

The Bank had attempted to recover the money from the first defendant step by step failing which only it attempted to take possession of the equipment. When this attempt failed the Bank immediately applied for and obtained the injunction. I find that the Bank had acted diligently and prudently to recover the money and the equipment. When it failed to recover the equipment, only then it asked the Court for the injunction. I think this is clearly an exceptional case where the Court is justified in granting a mandatory injunction on an *ex parte* application.

After considering all the circumstances of this case, including the rights of the parties, the balance of convenience and the urgency of the matter, I find that this is a proper and an appropriate case to grant the mandatory injunction.

In the circumstances, I dismiss the application with costs and reverse my order made in Chambers earlier.

*Application dismissed.*

Solicitors: *Radzi Sheikh Ahmad, Noor & Farid; Dennis Xavier & Co.*